Supreme Court, U. S.
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APR 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

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MASAKI HIGA, Petitioner;

**76-1466**

vs.

DR. JOHN L. McLUCAS, Secretary of the Air Force; ROBERT HAMPTON, Chairman, United States Civil Service Commission; FRANCIS E. BARRETT, Colonel, U.S. Air Force; JAMES HUSTED, Colonel, U.S. Air Force; EDWIN T. GRANT, M/Sgt. U.S. Air Force; SIK HUNG TSUI; WALTER C. Y. MAU; Respondents.

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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October Term, 1976

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No. 76—

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MASAKI HIGA, Petitioner;

vs.

DR. JOHN L. McLUCAS, Secretary of the Air Force; ROBERT HAMPTON, Chairman, United States Civil Service Commission; FRANCIS E. BARRETT, Colonel, U.S. Air Force; JAMES HUSTED, Colonel, U.S. Air Force; EDWIN T. GRANT, M/Sgt. U.S. Air Force; SIK HUNG TSUI; WALTER C. Y. MAU; Respondents.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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Petitioner MASAKI HIGA prays that a Writ of Certiorari issue to review the decision of the San Francisco Regional Office, United States Civil Service Commission dated September 2, 1971; the Decision of the Board of Appeals and Review, United States Civil Service Commission, dated October 21, 1971; the Order of the United States District Court for the District of Hawaii, filed therein on March 26, 1975, at 9:45 A.M., dismissing Petitioner's Second Amended Complaint; and the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit Court, filed and entered on January 27, 1977, affirming the Order of Dismissal of the District Court.

## OPINIONS BELOW

The Decision of the San Francisco Regional Office, United States Civil Service Commission dated September 2, 1971, which is not reported. A copy of the Decision is appended to this Petition.

The Decision of the Board of Appeals and Review, United States Civil Service Commission, dated October 21, 1971, which is not reported. A copy of the Decision is appended to this Petition.

The Order of the District Court for the District of Hawaii dated and filed March 26, 1975 which is not reported. A copy of the Order is appended to this Petition.

The Opinion and Judgment of the Circuit Court for the Ninth Circuit dated and filed January 27, 1977, which are not reported at this time. Copies of the Opinion and Judgment are appended to this Petition.

No Motions for Rehearing were filed in either the District Court or the Circuit Court of Appeals, and no Motion has been filed for extension of time for Petition for Writ of Certiorari.

## JURISDICTION OF THE SUPREME COURT

The statutory jurisdiction authorizing the issuance of a Writ of Certiorari is Title 28, United States Code, Sec. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Civil Service Commission, by the decisions of its San Francisco Regional Office and its Board of Appeals and Review, acted arbitrarily, capriciously, and abused its discretion, in refusing to grant the Petitioner an administrative review and evidentiary hearing following his dismissal from a Federal civil service job.



2. Whether the Petitioner was denied procedural due process of law under the Fifth Amendment of the United States Constitution by the aforesaid Decisions of the United States Civil Service Commission.

3. Whether the United States District Court for the District of Hawaii was in error in granting the Government's Motion to Dismiss the Petitioner's Second Amended Complaint in the original action seeking to set aside the Decisions of the United States Civil Service Commission.

4. Whether the United States District Court was in error in requiring the Petitioner to file a further Amended Complaint within 30 days following the District Court's Order of March 26, 1975, or suffer a dismissal with prejudice.

5. Whether the Circuit Court of Appeals for the Ninth Circuit was in error in affirming the Order of the District Court dismissing the Petitioner's Second Amended Complaint.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

**Constitutional Provisions**

Due Process Clause of the 5th Amendment of the Constitution of the United States

**Statutes**

5 U.S.C. Sec. 702, Right of Review

5 U.S.C. Sec. 703, Form and Venue of Proceeding

5 U.S.C. Sec. 704, Actions Reviewable

5 U.S.C. Sec. 706, Scope of Review

5 U.S.C. Sec. 2108, Veteran; Disabled Veteran Preference Eligible

5 U.S.C. Sec. 5596

5 U.S.C. Sec. 7501

5 U.S.C. Sec. 7511

5 U.S.C. Sec. 7701, Appeals of Preference Eligibles

**Civil Service Regulations**

5 C.F.R. Sec. 752.203

**United States Civil Service Commission Board of Appeals and Review, Adverse Action Appeals Procedure**

**Presidential Executive Order**

Executive Order No. 10987,
January 18, 1962 (27 F.R. 550)

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## STATEMENT OF THE CASE

Petitioner Masaki Higa was a career United States civil service employee and a Veterans' Preference employee working at Hickam Air Force Base, Honolulu, Hawaii, as an Aircraft Electrician. He was initially hired on August 18, 1954 as an Aircraft Electrical Helper at the Electrical Systems Shop, Squadron Staff Maintenance Office, 619th Military Airlift Support Squadron, Hickam Air Force Base, U.S. Air Force. Thereafter, he became a career Federal employee with full employment rights and benefits, and in addition, a Veterans' Preference employee, pursuant to the Veterans' Preference Act of 1944, 5 U.S.C. Sec. 863.

Petitioner Higa worked continuously as a career Federal civil service employee for 27 years with "satisfactory" and "excellent" ratings, until he was removed from his position and dismissed, effective October 16, 1970, and he had received a commendation for outstanding achievement in 1961. At the time of his removal and dismissal, he held Journeyman ratings of Aircraft Electrician and General Electrician.



On October 16, 1970, immediately after receiving a "Notice of Personnel Action" from his employer, Petitioner requested his union agent James S. Yoshida, Assistant Business Manager of IBEW Local 1186, to file an administrative appeal on his behalf, and signed an authorization for Mr. Yoshida to represent him in such appeal.

Both Petitioner and Mr. Yoshida were advised by Petitioner's employer that an appeal had to be filed with the United States Civil Service Commission within 15 days following the effective date of Petitioner's dismissal. Petitioner visited Mr. Yoshida twice during the 15 day period, and pointedly inquired about his administrative appeal, and Yoshida assured Petitioner that the appeal would be filed.

Mr. Yoshida failed to file the appeal with the Civil Service Commission, but never informed Petitioner of his failure to file the appeal. For several months following the expiration of the 15-day period, Petitioner periodically visited or telephoned Yoshida, inquiring about the status of his administrative appeal, but was never informed that the appeal had not been filed.

However, Yoshida apparently realized that he had allowed the 15-day period to elapse without filing an administrative appeal for Petitioner and on November 27, 1970, Yoshida wrote directly to Congressman Spark Matsunaga concerning Petitioner's dismissal, and requested assistance from the Congressman in securing an administrative appeal for Masaki Higa.

In this letter to Congressman Matsunaga, Yoshida stated:

> "There seems to be some mix-up in the reply period on the decision rendered, and the result is the period as required in the Letter of Decision was overlooked."
>
> "We have no other recourse but to your office for consideration in this matter."

Congressman Matsunaga responded to Yoshida's request by writing to Robert E. Hampton, the Chairman of the U.S. Civil Service Commission on December 17, 1970, asking for re-consideration of Petitioner's dismissal. The Congressman sent a copy of his letter to Yoshida, but did not inform Petitioner of Yoshida's letter.

On December 23, 1970, the Board of Appeals and Review, of the U.S. Civil Service Commission, by William P. Berzak, its Chairman, answered Congressman Matsunaga's letter, stating that the Congressman's letter had been sent to the San Francisco Regional office of the Civil Service Commission for response.

On January 6, 1971, the San Francisco Regional Office, by Asa T. Briley, Director, responded to Congressman Matsunaga's letter, and stated:

> "We have no record of having received an appeal from Mr. Higa. We would have basis for extending the time period and accepting an appeal at this late date only if Mr. Higa can establish that circumstances beyond his control prevented him from appealing before this time. If Mr. Higa wishes to proceed further with the appeal he should send us an explanation of the reasons for the delay."

Neither Mr. Briley nor Congressman Matsunaga ever sent a copy of this letter to Petitioner, nor did they inform Petitioner that no administrative appeal had been filed for Petitioner.

Thereafter, there was no further communication between Mr. Yoshida and Congressman Matsunaga, but Petitioner continued to inquire periodically of Mr. Yoshida, concerning the status of his administrative appeal. At no time did Mr. Yoshida, Congressman Matsunaga, or any officer or employee of the U. S. Civil Service Commission notify Petitioner that no appeal had been filed on his behalf.

On May 3, 1971, still not knowing that no appeal had ever been filed on his behalf, Petitioner wrote to U.S.



Senator Hiram L. Fong, asking for assistance toward reinstatement to his job.

Senator Fong responded to Higa on May 18, 1971, stating:

> "Please advise me of the status of your appeal and where it is at the present time. When I receive this information, I shall be happy to write to the appropriate agency in your behalf."

Petitioner answered Senator Fong on May 24, 1971, by stating:

> "Representative Matsunaga is still working on the matter of consideration toward reinstatement to my aircraft electrician job. I presume apparently it is beyond his power to assist me. Only Representative Matsunaga knows my status of my appeal and where it is at the present time. Until today no word has come to me on the matter."

Petitioner again wrote to Senator Fong on July 9, 1971, stating:

> "Many months have passed and I do not know where I stand in my appeal for reinstatement to my former job and so could you kindly inform me on it and I will appreciate it very much."

Finally, on August 17, 1971, after communicating with Col. James J. Shepard, Congressional Inquiry Division, Office of Legislative Liaison, Senator Fong wrote to Petitioner stating:

> "Enclosed is a reply from Col. James J. Shepard, Congressional Inquiry Division, Office of Legislative Liaison concerning your appeal for reinstatement. According to Col. Shepard, you have not appealed your removal to either the Air Force or the Civil Service Commission. Consequently the Air Force is unable to consider your case at this time."
>
> "May I recommend that you file your appeal with the Civil Service Commission so that your case may be reviewed."

This was the first time that Petitioner Higa knew that no administrative appeal had been filed on his behalf. Within a few days, on August 24, 1971, Masaki Higa personally wrote to the Director, San Francisco Region, U.S. Civil Service Commission, stating:

> "I am enclosing letters, photostatic copies of newspaper clippings and filing my appeal concerning my removal as an employee of the U.S. Air Force at Hickam Air Force Base to the Civil Service Commission. I performed my work in a satisfactory manner prior to the incident which led to my removal.
>
> "In view of my satisfactory employment record I am inclined to believe that my removal was rather severe punishment for "failure to carry out instructions" and disorderly conduct.
>
> "I would appreciate your review on my request for reinstatement to my former aircraft electrician job. I am a disabled veteran of World War II, having served with the 442nd Infantry Regiment, Regimental Head Quarters Company as a telephone communication team leader.
>
> "The reason I am filing my own appeal so late is because my I.B.E.W. Union 1186 representative failed to do it for me.
>
> "I did not have any hearings and was removed from my job."

The San Francisco Regional Office of the U.S. Civil Service Commission by Gordon J. Peterson, Appeals Examiner, answered Petitioner on September 2, 1971, stating in part:

> "The fact that your representative failed to submit a timely appeal is not a circumstance beyond your control which would enable the Commission to extend the time limit. We are, accordingly, obliged to deny your appeal as untimely.
>
> "Unless this decision is further appealed to the Board of Appeals and Review, U.S. Civil Service Commission, within 15 calendar days of the day it is received, it becomes the final decision of the Civil Service Commission. Procedures for submitting appeals to the Board are set forth in the attached CSC Form 942."



On September 8, 1971, six days following the decision of the San Francisco Regional office, Petitioner personally appealed the decision to the Board of Appeals and Review of the U.S. Civil Service Commission, and stating in part:

> "When I received my removal paper from the Hickam Civilian Personnel Office I immediately took it to Mr. James S. Yoshida, Assistant Business Manager, Local No. 1186 IBEW who wrote to Congressman Spark Matsunaga requesting his assistance on my appeal case. I tried my utmost but Mr. Yoshida was my representative in my appeal case. After many months had passed Mr. Yoshida still did not inform me of my appeal status and we discontinued communicating with each other. If I was not in the union I would have filed my appeal promptly.
>
> "I wrote to Senator Hiram Fong requesting his assistance in finding out the status of my appeal and where it was. After his kind and great effort of letter writing to various agencies, he found out for me that my appeal was never filed. Mr. Yoshida failed to file an appeal in my behalf with the Civil Service Commission within the time limit as was discussed. Senator Fong recommended me to file my appeal and have it reviewed. I filed my removal appeal with the San Francisco Regional Civil Service Commission and my appeal was denied as untimely through no fault of mine but Local No. 1186 IBEW Assistant Business Manager James S. Yoshida.
>
> "I am appealing this unfortunate decision to you gentlemen and would appreciate it very much if it were reviewed and reconsidered with utmost

fairness and reinstate me to my former aircraft electrician job."

The Board of Appeals and Review of the U.S. Civil Service Commission reviewed the decision of the San Francisco Regional Office, and on October 21, 1971, affirmed the decision of the Regional Office, stating in part:

> "Based upon its review of the record evidence, the Board concurs with the decision of the Regional Office that the fact that the appellant's representative failed to submit a timely appeal was not a circumstance beyond his control which would warrant the commission to extend the time limit."

(The complete text of the decisions of the San Francisco Regional Office and the Board of Appeals and Review are included in the Appendix to this Petition. The complete text of the various letters referred to hereinabove are contained in the record in the Petitioner's appeal to the Ninth Circuit Court, which Petitioner submits in support of this Petition.)

After receiving the decision of the Board of Appeals and Review, Petitioner attempted to secure legal counsel to commence judicial review of the decisions of the San Francisco Regional Office and Board of Appeals and Review of the U.S. Civil Service Commission. Petitioner asked no less than five attorneys and the ACLU to take up his case, but was unsuccessful until his present counsel in Hawaii agreed to represent him.

Civil No. 74-190 was filed in the United States District Court for the District of Hawaii on July 31, 1974. The original Complaint was against the Secretary of the Air Force, the Chairman of the U.S. Civil Service Commission, and five of Petitioner's Air Force and civilian superior officers, and sought declaratory and injunctive relief, money damages, and reinstatement together with backpay and accrued benefits. The Answer of the Defendants, by the United States Attorney was filed on



October 30, 1974. Thereafter the Defendants filed a Motion to Dismiss or in the alternative, Motion for Summary Judgment. Petitioner then filed a Motion For Leave to Amend Complaint, and a proposed Amended Complaint, to which the Defendants responded by a Memorandum in Opposition. Petitioner then filed a Motion to Substitute Second Amended Complaint. The Defendants' Motion to Dismiss was heard on February 14, 1975. The Court allowed Petitioner to substitute the Second Amended Complaint, which was filed in open Court.

The Second Amended Complaint dismissed the original Defendants, and substituted the Chairman and members of the United States Civil Service Commission as the parties Defendant. The Second Amended Complaint also dismissed all claims for money damages and for Judicial review of the Merits of the Petitioner's dismissal from his job, and for reinstatement, reserving the right to make such claims in the future.

The Second Amended Complaint was directed to the issue of procedural due process, and sought by way of Judicial relief, an Order compelling the Civil Service Commission to grant Petitioner an administrative appeal of his dismissal, including a full evidentiary hearing with the right to call witnesses on his behalf. The grounds stated by Petitioner in the Second Amended Complaint were that the two decisions of the U.S. Civil Service Commission were illegal and unconstitutional, in violation of Petitioner's civil rights and property rights, and constituted arbitrary, unreasonable and capricious action and an abuse of discretion, and a denial of the due process of law and the equal protection of the laws.

The United States Attorney accepted personal service of the Second Amended Complaint on behalf of the original and the substituted Defendants, and waived all responsive pleadings except the pending Motion to Dismiss or for Summary Judgment.

The Court allowed testimony by the Petitioner Masaki Higa in which he stated unequivocally that his union representative never informed him that no administrative appeal had been filed on his behalf, despite numerous and repeated inquiries by Higa concerning the status of his appeal, over a period of several months. Petitioner was unable to locate the union representative, James Yoshida, for testimony, as he had left the State of Hawaii shortly after Petitioner was discharged from his job, with no known forwarding address.

Following arguments by respective counsel, the District Court granted the Defendants' Motion to Dismiss, by an Order filed on March 26, 1975. The Order required Petitioner to file a further Amended Complaint within 30 days following the dismissal; otherwise the dismissal of the Second Amended Complaint would be considered as a dismissal with prejudice.

The jurisdiction of the United States District Court was based on the following statutes:

**28 USC Sec. 1331,** lawsuits arising under the Constitution and laws of the United States, involving an actual and justiciable controversy between the Plaintiff and Defendants, and the matter in controversy exceeding the sum or value of $10,000.00 exclusive of interest and costs.

**5 USC Sec. 701-706,** judicial review of administrative actions by officers and agencies of the United States Government.

**28 USC Sec. 2201,** declaratory judgment as to Petitioner's right to an administrative appeal, and the duty of the U.S. Civil Service Commission to accept and hear the appeal.

Petitioner filed a timely appeal from the Order of the District Court to the Ninth Circuit Court. Oral argument was heard in Honolulu in May, 1976, and the Opinion and Judgment of the Circuit court was entered on January 27, 1977, affirming the Order of the District



Court. This Petition for Writ of Certiorari now seeks a review of the two decisions of the U.S. Civil Service Commission, the Order of the U.S. District Court for Hawaii and the Opinion and Judgment of the Ninth Circuit Court.

## ARGUMENT AND REASONS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The administrative rules and regulations governing initial appeals of dismissals from U.S. civil service positions is contained in C.F.R. Title 5, Administrative Personnel, Sec. 752.203, Right of Appeal to the Commission. The pertinent language of the regulations states:

> "An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such officer of proof and pertinent documents as he is able to submit.
>
> (a) Time limit for appeal. An employee may submit an appeal at any time after receipt of the notice of adverse decision but not later than 15 days after the adverse action has been effected. The Commission may extend the time limit on an appeal to it when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit."

The rules and regulations governing administrative appeals to the Board of Appeals and Review of the U.S. Civil Service Commission is contained in C.F.R. Title 5, Part 772. The pertinent language states:

> "Complete appeals must be filed within fifteen calendar days from date of receipt of the initial Commission decision. In cases where the appellant, either the individual or the agency, is represented by more than one representative, submissions from all representatives must be made within the allotted

fifteen calendar days. Extensions will not be granted unless justifiable reasons for extension are presented.

"When an appeal is filed later than fifteen calendar days after receipt of the initial Commission decision, the appellant will be given an opportunity to explain his failure to file the appeal within the prescribed time.

"Where the Board decides that circumstances beyond the appellant's control prevented the appellant from filing a timely appeal, the Board will accept the appeal. If, in the judgment of the Board, the delay in filing an appeal was not caused by circumstances beyond the appellant's control, a decision will be issued declining to entertain the appeal without any further action."

The two decisions of the U.S. Civil Service Commission, The United States District Court, and the Ninth Circuit Court of Appeals all hinge upon the interpretation of the words: "circumstances beyond . . . control" of the Appellant.

Petitioner Masaki Higa did not know, and was never informed, that his administrative appeal had not been filed, until Senator Fong discovered this fact and wrote to Higa on August 17, 1971.

Upon learning that his appeal had never been filed by his authorized union representative, Petitioner took immediate action, and on August 24, 1971, seven days after Senator Fong's letter was posted in Washington, D.C., he wrote a personal appeal to the San Francisco Regional Office of the Civil Service Commission. He later followed with a timely appeal to the Board of Appeals and Review.

All the administrative and judicial decisions below take the position that the fact that Petitioner's union representative failed to file the administrative appeal "was not a circumstance beyond (Petitioner's) control." The decisions below ignore or disregard the proven fact



that Petitioner zealously inquired about his appeal numerous times, but was never informed that it had not been filed. The opinion of the Ninth Circuit Court states that Masaki Higa "made no showing that he was misled by the union official . . .," and that he did not show that he "was under some disability that rendered him unable to file an appeal personally within the prescribed period."

It is submitted that the deliberate withholding of information by the union representative in this case was just as completely misleading to Petitioner as a false statement. Furthermore, physical disability cannot be the criteria for judgment of Petitioner's actions in this case, inasmuch as he took immediate personal action to perfect his administrative appeal as soon as he was informed by Senator Fong that his union representative had not filed the appeal on his behalf.

The failure of the administrative agencies and the Courts below to take these facts properly into consideration and grant Petitioner his administrative appeal, as late as it may be, constitute action that is arbitrary, unreasonable, capricious and an abuse of discretion, and a violation of law, and therefore a denial of procedural due process of law under the Fifth Amendment of the United States Constitution.

Insofar as the legal definition of the statutory language "circumstances beyond the appellant's control" is concerned, this case is a case of first impression. Petitioner has been unable to discover any reported decision which sets forth any guidelines for the interpretation of this language, and therefore it is submitted that a decision should be made regarding circumstances such as Petitioner's, where the failure to file an administrative appeal was entirely without neglect or fault on the part of the Appellant (Petitioner). The doctrine of imputed negligence appears to be the unstated basis for the decisions and opinions below. In an area of civil rights and prop-

erty rights as important to the individual as this case is to Masaki Higa, involving a person's sole meaningful means to support and livelihood, it would be a grotesque result to apply inflexibly the tort rule of master and servant, where the principal, Higa, has done no wrong to anyone, and is himself the party injured by the negligence of his agent, the union representative James Yoshida.

Petitioner is a disabled veteran of World War II, and was therefore a "preference eligible" civil service employee, which fact was known to his employer, being of record in his personnel file, and even noted in the Decision of the Board of Appeals and Review. As a preference eligible employee, Petitioner was not required to file an appeal within 15 days or prove "circumstances beyond his control." His appeal rights are governed by a special appeal provision, which allows appeals to be filed "within a reasonable time after receipt of notice of the adverse decision." 5 U.S.C. Sec. 7701. This fact was not taken into consideration, by the Petitioner's employer, the U.S. Civil Service Commission, the U.S. District Court, or the Ninth Circuit Court. Petitioner *did* file his administrative appeal within one week after discovery that the appeal had not been filed by his union representative. It is submitted that Petitioner submitted his appeal within a reasonable time under the special administrative appeal provisions applicable to preference eligible civil service employees.

The Order of the District Court was in error in dismissing Petitioner's Second Amended Complaint with prejudice insofar as it may relate to the merits of Petitioner's dismissal. The Second Amended Complaint was addressed solely to the right to an administrative appeal. Petitioner has never had the opportunity to contest or litigate the merits of his dismissal, but intends to do so if this Petition is granted and he is finally given his right to an administrative hearing on appeal to the U.S. Civil Service Commission.



## CONCLUSION

On reason and justice, and on the grounds set forth in the original action in the U.S. District Court, in the appeal to the Ninth Circuit Court of Appeals, and as set forth in this Petition, Petitioner Masaki Higa respectfully prays that a Writ of Certiorari issue for a review of the Decisions, Orders, and Judgments below.

Respectfully submitted,

WILLIAM E. NELSON
Suite 700
1707 H Street N.W.
Washington, D.C., 20006

ROBERT K. FUKUDA
470 Alexander Young Bldg.
Honolulu, Hawaii 96813

Counsel for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 1977, three copies of the Petition for Write of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, Counsel for the Respondent.

I further certify that all parties required to be served have been served.

WILLIAM E. NELSON
Suite 700
1707 H Street N.W.
Washington, D.C., 20006

Counsel for Petitioner.



# APPENDIX

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Address:
DIRECTOR, SAN FRANCISCO REGION
U.S. CIVIL SERVICE COMMISSION
450 GOLDEN GATE AVENUE, BOX 36096
SAN FRANCISCO, CALIF. 94102

UNITED STATES CIVIL SERVICE COMMISSION

SAN FRANCISCO REGION

COMPRISING CALIFORNIA, NEVADA, HAWAII, AND PACIFIC AREA

OFFICE OF THE DIRECTOR, SAN FRANCISCO, CALIFORNIA 94102

IN REPLY PLEASE REFER TO

SFA:GJP:reh

YOUR REFERENCE

Mr. Masaki Higa
2767 Kalihi Street
Honolulu, HI 96819

SEP - 2 1971

Dear Mr. Higa:

This is in reference to your letter of August 24, 1971, appealing the action of Hickam Air Force Base in removing you from the position of Aircraft Electrician, effective October 6, 1970.

The Civil Service Regulations covering appeals to the Civil Service Commission from adverse actions of agencies provide that an employee may submit an appeal at any time after receipt of the notice of adverse decision but not later than 15 days after the adverse action has been effected. They further provide that the Commission may extend the time limit for appealing when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit.

A review of the notice of final decision, dated October 6, 1970, notifying you of the decision to effect your removal, discloses that you were specifically informed of your right to file an appeal either with the Civil Service Commission or under the Air Force appeal procedures and that such appeal must be filed not later than 15 days after the effective date of your removal.

The records in this office disclose that on November 27, 1970, Mr. James S. Yoshida, Assistant Business Manager, Local No. 1186, IBEW, wrote to Congressman Spark Matsunaga in your behalf. Congressman Matsunaga forwarded the communication to this office and in reply we stated that we had no record of having received an appeal from you and in view of the time that had elasped we would have no basis for extending the time period for accepting an appeal unless you could establish that circumstances beyond your control prevented you from appealing before that time. We heard nothing further from you until your letter of August 24, 1971.

You state that the reason your appeal is late is because your IBEW union failed to file one for you.

The fact that your representative failed to submit a timely appeal is not a circumstance beyond your control which would enable the Commission to extend the time limit. We are, accordingly, obliged to deny your appeal as untimely.

Unless this decision is further appealed to the Board of Appeals and Review, U.S. Civil Service Commission, within 15 calendar days of the day it is received, it becomes the final decision of the Civil Service Commission. Procedures for submitting appeals to the Board are set forth in the attached CSC Form 942.

FOR THE DIRECTOR

Sincerely yours,

Gordon J. Petersen
Appeals Examiner

cc: Civilian Personnel Officer
619th Military Airlift Support
Squadron (MAC)
APO San Francisco 96553

Director of Civilian Personnel
Hq. U.S. Air Force
Department of the Air Force
Washington, D.C. 20330

Honorable Spark Matsunaga
House of Representatives
Washington, D.C. 20515



UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO
BAR:jrf
October 21, 1971

YOUR REFERENCE

AIR MAIL
Mr. Masaki Higa
2767 Kalihi Street
Honolulu, Hawaii 96819

Dear Mr. Higa:

Enclosed is a copy of the Board's decision in your case.

Sincerely yours,

William P. Berzak
William P. Berzak
Chairman

Enclosure

cc: AIR MAIL
Civilian Personnel Officer
619th Military Airlift Support
Squadron (MAC)
APO San Francisco, California 96553

cc: San Francisco Regional Office
U.S. Civil Service Commission

UNITED STATES

CIVIL SERVICE COMMISSION

BOARD OF APPEALS AND REVIEW

WASHINGTON, D.C. 20415

# DECISION

IN THE MATTER OF

Mr. Masaki Higa
Department of the Air Force
Hickam AFB, Hawaii

William P. Boyak

CHAIRMAN

October 21, 1971



UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
Washington, D. C. 20415

D E C I S I O N

IN THE MATTER OF

Higa, Masaki

TYPE CASE: REMOVAL

## INTRODUCTION

Mr. Masaki Higa appealed to the Board of Appeals and Review by letter dated September 8, 1971, from the decision issued by the Commission's San Francisco Regional Office on September 2, 1971 declining to accept his appeal since it was untimely filed.

## STATEMENT OF THE CASE

The Hickam Air Force Base issued Mr. Higa an advance notice on September 10, 1970 advising him that it was proposed to remove him from the service not earlier than thirty days after his receipt of said letter for failure to carry out instructions and disorderly conduct.

By letter dated September 24, 1970, Mr. James S. Yoshida replied in the appellant's behalf. After review of the reasons for the proposed action and the appellant's reply, the agency by letter dated October 6, 1970 issued its decision to remove the appellant from the service effective October 16, 1970.

By letter under date of August 24, 1971, the appellant appealed to the Commission's San Francisco Regional Office. He contended that the reason his appeal was late was because his IBEW union representative failed to file an appeal for him. The Regional Office issued its decision on September 2, 1971, declining to entertain the appeal since it was untimely filed. The Region noted that nothing had been heard from the appellant following the Region's letter to Congressman Matsunaga on January 6, 1971 until his (the appellant's) letter of August 24, 1971.

## ANALYSIS AND FINDINGS

Part 752 of the Civil Service Regulations provides that an employee may submit an appeal to the Commission at any time after receipt of the notice of adverse decision but not later than 15 days after the adverse action has been effected. The prescribed time limits may be extended at the discretion of the Commission upon a showing by the employee that he was not notified of the applicable time limit and was not otherwise aware of it, or that circumstances beyond his control prevented him from filing an appeal within the time limit.

The Board finds that, in the agency's letter of final decision, the appellant was specifically informed of his right to file an appeal either with the Civil Service Commission or under the Air Force appeal procedures and that such an appeal must be filed not later than 15 days after the effective date of his removal.

The record further discloses that on November 27, 1970, Mr. James S. Yoshida, Assistant Business Manager, Local No. 1186, IBEW, wrote to Congressman Spark Matsunaga in the appellant's behalf. The Congressman's letter was forwarded to the San Francisco's Regional Office for consideration and reply. The Regional Office replied stating that there was no record of Mr. Higa's appeal having been received and that in view of the time that had elapsed, there was no basis for extending the time period for accepting the appeal unless the appellant could establish that circumstances beyond his control prevented him from appealing before that time. No further correspondence was filed with the Regional office by the appellant or his representative until the appellant's letter of August 24, 1971.

Based upon its review of the record evidence, the Board concurs with the decision of the Regional Office that the fact that the appellant's representative failed to submit a timely appeal was not a circumstance beyond his control which would warrant the Commission to extend the time limit.

## DECISION

The decision of the Commission's San Francisco Regional Office issued September 2, 1971 is hereby affirmed.

The decision of the Board is final and there is no further right to appeal.

For the Commissioners:

William P. Berzak
Chairman

October 21, 1971



IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

| | | |
|---|---|---|
| MASAKI HIGA,<br><br>Plaintiff,<br><br>vs.<br><br>DR. JOHN L. McLUCAS,<br>Secretary of the Air Force,<br>et al.,<br><br>Defendants. | ) | CIVIL NO. 74-190 |

FILED IN THE
UNITED STATES DISTRICT COURT
DEC 21 1915
9 45 A

## O R D E R

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

| | | |
|---|---|---|
| MASAKI HIGA, Plaintiff, | ) | CIVIL NO.74-190 |
| vs. | ) | |
| DR. JOHN L. McLUCAS, Secretary of the Air Force, et al., Defendants. | ) | |

O R D E R

This case was called for a hearing on various motions. The Court first addressed the Plaintiff's motions to amend the complaint. The Plaintiff withdrew his first request to amend complaint and the Court granted leave to the Plaintiff to substitute his second amended complaint, together with the Affidavit of Masaki Higa, Plaintiff, and Exhibits "A" - "J" inclusive.

The Government accepted service in open Court upon Defendants Robert E. Hampton, Jayne Spain and L. J. Andolsek, and waived all responsive pleadings.

The Government then made an oral motion to dismiss the Second Amended Complaint and requested that its memorandum of points and authorities heretofore filed be considered by the Court and applied in pertinent part to the Second Amended Complaint.

The Court granted leave to the Government to make the oral motion to dismiss, and took into consideration the Government's and Plaintiff's memorandum of points and authorities and attachments.



The Court denies Plaintiff's request that the Court take jurisdiction of this case under 28 U.S.C. § 1331. The Court's jurisdiction is found in 5 U.S.C. § 701, et seq. and Albert v. Chafee, 465 F.2d 368 (9th Cir. 1973).

The facts before this Court indicate that upon Plaintiff's termination from civil service, he was duly notified that he had 15 days within which to file a notice of administrative appeal. Following receipt of the termination letter the Plaintiff contacted his union representative and spoke with him regarding an appeal two to three times during the 15-day period. According to the Plaintiff's testimony and the affidavit and Exhibits, he requested that the union represent him and file the appropriate notice of appeal. The Union and its representatives failed to timely file the notice of administrative appeal.

Approximately one year passed at which time the Plaintiff instituted appeal proceedings with the regional office of the Civil Service Commission which after an adverse ruling he appealed to the Board of Appeals which affirmed the ruling of the regional office.

The Court has reviewed the official documents attached to the motion for summary judgment, received the testimony of the Plaintiff in open Court, and allowed argument by the Government attorney and counsel for the Plaintiff.

The Court finds that the denial of the Plaintiff's administrative appeal by the regional office and the Board of Appeals of the United States Civil Service Commission was not arbitrary or capricious.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Second Amended Complaint be dismissed. Plaintiff is granted leave to file an amended complaint; in the event such a complaint is not filed within 30 days of the filing of this Order, dismissal of the Second Amended Complaint will be considered as a dismissal with prejudice.

DATED: March 26, 1975, at Honolulu, Hawaii.

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

ROBERT K. FUKUDA
Attorney for Plaintiff



# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MASAKI HIGA,
*Plaintiff-Appellant,*

vs.

DR. JOHN L. MCLUCAS, Secretary of the Air Force; ROBERT HAMPTON, Chairman, United States Civil Service Commission; FRANCIS E. BARRETT, Colonel, U. S. Air Force; JAMES HUSTED, Colonel, U. S. Air Force; EDWIN T. GRANT, M/Sgt, U. S. Air Force; SIK HUNG TSUI; WALTER C. Y. MAU,
*Defendants-Appellees.*

No. 75-2502

OPINION

[January 27, 1977]

Appeal from the United States District Court
for the District of Hawaii

Before: BROWNING, TRASK, and KENNEDY,
Circuit Judges.

PER CURIAM:

In September 1970, appellant Masaki Higa, a career federal employee at Hickam Air Force Base in Hawaii, received notice that the Department of the Air Force proposed to terminate his employment. The stated grounds for the proposed action were Higa's allegedly disorderly conduct and his alleged failure to follow instructions. After considering Higa's written response, the Department of the Air Force terminated his employment, effective October 16, 1970. In its notice of decision, the Department notified Higa of his right of appeal either to the Secretary of the Air Force or to the United States Civil Service Commission. He was advised that any such appeal must be filed within fifteen days from the effective date of his removal.

On October 16, 1970, appellant met with a union official concerning his termination. The official agreed to file an administrative appeal with the United States Civil Service Commission on Higa's behalf. The union official, however, failed to file the appeal, and the fifteen-day period expired. Ultimately, on August 24, 1971, more than ten months after the effective date of his dismissal, Higa personally filed an appeal with the regional office of the United States Civil Service Commission.

Apparently relying on 5 C.F.R. § 752.203(b) (1970),[1] the regional office ruled that Higa's appeal was untimely. Section 752.203(b) provided in pertinent part:

> (b) Time limit. (1) Except as provided in subparagraphs (2), (3), and (4) of this paragraph, an employee may submit an appeal at any time after receipt of the notice of adverse decision but not later than 15 calendar days after the adverse action has been effected.
>
> . . . .
>
> (4) The Commission may extend the time limits in this paragraph when the appellant shows that he was not notified of the applicable time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit.

The regional office also concluded that the union official's failure to file the appeal did not by itself constitute "circumstances beyond [Higa's] control," under section 752.203(b)(4). The United States Civil Service Commission Board of Appeals and Review affirmed.

Higa then filed an action in the district court seeking to compel the Civil Service Commission to entertain his appeal. In response to Higa's second amended complaint, the Government

[1]The employees to whom this section was applicable included: "Any career, career-conditional, overseas limited, indefinite, or term employee, or any employee serving under a career or limited executive assignment, in a competitive position who is not serving a probationary or trial period . . . ." 5 C.F.R. § 752.201(a)(1)(i) (1970). At the time of his termination from the Air Force, Higa was a career employee in a competitive position; he was also a Veteran's Preference employee. As such, he came within the terms of section 752.201(a)(1)(i), and the time limitation for appeals to the Civil Service Commission applies.



moved for summary judgment. After taking additional testimony, the trial court granted the motion. Higa appeals.

In the court below, Higa challenged the Commission's determination that he had not established that failure to make a timely filing was due to circumstances beyond his control. The scope of review of the Commission's decision, both here and in the district court, is limited to a determination of whether the Commission abused its discretion or whether its actions were arbitrary and capricious. 5 U.S.C. § 706. Our review, furthermore, must be based solely on the administrative record. Proietti v. Levi, 530 F.2d 836, 838 (9th Cir. 1976).

The Commission's regulations, 5 C.F.R. § 752.203(b)(4), indicate that the burden is on the employee challenging agency action to establish that he was prevented by circumstances beyond his control from appealing to the Commission within the fifteen-day time limit. In this case, Higa merely alleged that he relied on a union official to submit the appeal. He made no showing that he was misled by the union official during the ten-month interim between the effective date of termination and his personal submission of an appeal in August 1971. Neither does the record indicate that Higa was under some disability that rendered him unable to file an appeal personally within the prescribed period. The administrative record contains little or nothing that lends support to Higa's assertion that he was prevented by circumstances beyond his control from filing an appeal to the Commission within the fifteen-day period. On this record, it cannot be said that the Commission abused its discretion or acted arbitrarily and capriciously in denying Higa's administrative appeal. Accordingly, it was proper for the district court to grant the Government's motion for summary judgment.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 2-3-77—410

## AMENDMENTS TO THE CONSTITUTION

**[Article V.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

**Statutes**

**5 U.S.C. Sec. 702**

**§ 702. Right of review.**

**A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)**

**5 U.S.C. Sec. 703**

**§ 703. Form and venue of proceeding.**

**The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is**

subject to judicial review in civil or criminal proceedings for judicial enforcement. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

5 U.S.C. Sec. 704

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

5 U.S.C. Sec. 706

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;



(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

5 U.S.C. Sec. 2108

§ 2108. Veteran; disabled veteran; preference eligible.

For the purpose of this title—

(1) "veteran" means an individual who—

(A) served on active duty in the armed forces during a war, in a campaign or expedition for which a campaign badge has been authorized, or during the period beginning April 28, 1952, and ending July 1, 1955; or

(B) served on active duty as defined by section 101(21) of title 38 at any time in the armed forces for a period of more than 180 consecutive days after January 31, 1955, not including service under section 511(d) of title 10 pursuant to an enlistment in the Army National

Guard or the Air National Guard or as a Reserve for service in the Army Reserve, Naval Reserve, Air Force Reserve, Marine Corps Reserve, or Coast Guard Reserve;

and who has been separated from the armed forces under honorable conditions;

(2) "disabled veteran" means an individual who has served on active duty in the armed forces, has been separated therefrom under honorable conditions, and has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Veterans' Administration or a military department; and

(3) "preference eligible" means—

(A) a veteran as defined by paragraph (1) (A) of this section;

(B) a veteran as defined by paragraph (1) (B) of this section;

(C) a disabled veteran;

(D) the unmarried widow of a veteran as defined by paragraph (1) (A) of this section;

(E) the wife of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the mother of an individual who lost his life under honorable conditions while serving in the armed forces during a period named by paragraph (1) (A) of this section, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed,



divorced, or legally separated from her husband when preference is claimed; and

(G) the mother of a service-connected permanently and totally disabled veteran, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 410; Pub. L. 90–83, § 1(6), Sept. 11, 1967, 81 Stat. 196; Pub. L. 90–623, § 1(2), Oct. 22, 1968, 82 Stat. 1312.)

5 U.S.C. Sec. 5596

§ 5596. Back pay due to unjustified personnel action.

(a) For the purpose of this section, "agency" means—

(1) an Executive agency;

(2) the Administrative Office of the United States Courts;

(3) the Library of Congress;

(4) the Government Printing Office; and

(5) the government of the District of Columbia.

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the per-

sonnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

(c) The Civil Service Commission shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees. (Added Pub. L. 90–83, § 1 (34) (C), Sept. 11, 1967, 81 Stat. 203.)

5 U.S.C. Sec. 7501

§ 7501. Cause; procedure; exception.

(a) An individual in the competitive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service.

(b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—

(1) notice of the action sought and of any charges preferred against him;

(2) a copy of the charges;

(3) a reasonable time for filing a written answer to the charges, with affidavits; and

(4) a written decision on the answer at the earliest practicable date.

Examination of witnesses, trial, or hearing is not required but may be provided in the discretion of



the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

(c) This section applies to a preference eligible employee as defined by section 7511 of this title only if he so elects. This section does not apply to the suspension or removal of an employee under section 7532 of this title. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 527.)

5 U.S.C. Sec. 7511

§ 7511. Definitions.

For the purpose of this subchapter—

(1) "preference eligible employee" means a permanent or indefinite preference eligible who has completed a probationary or trial period as an employee of an Executive agency or as an individual employed by the government of the District of Columbia, but does not include an employee whose appointment is required by Congress to be confirmed by, or made with the advice and consent of, the Senate, except an employee whose appointment is made under section 3311 of title 39; and

(2) "adverse action" means a removal, suspension for more than 30 days, furlough without pay, or reduction in rank or pay.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 528.)

5 U.S.C. Sec. 7701

§ 7701. Appeals of preference eligibles.

A preference eligible employee as defined by section 7511 of this title is entitled to appeal to the Civil Service Commission from an adverse decision under section 7512 of this title of an administrative authority so acting. The employee shall submit the appeal in writing within a reasonable time after receipt of notice of the adverse decision, and is entitled to appear personally or through a representative under regulations prescribed by the Commission. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority and shall send copies of the findings and recommendations to the appellant or his representative. The administrative authority shall take the corrective action that the Commission finally recommends. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 530.)

HISTORICAL AND REVISION NOTES

| *Derivation* | *U.S. Code* | *Revised Statutes and Statutes at Large* |
|---|---|---|
| ---- | 5 U.S.C. 863 (less 1st 168 words, and less 2d proviso). | June 27, 1944, ch. 287, § 14 (less 1st 168 words, and less 2d proviso), 58 Stat. 390. |
| | | Aug. 4, 1947, ch. 447, 61 Stat. 723. |
| ---- | 5 U.S.C. 868 (proviso). | June 22, 1948, ch. 604, 62 Stat. 575. |

The application of the section is established by the words "A preference eligible employee as defined by section 7511 of this title". Specific mention of the actions appealable are covered by the reference to "an adverse decision under section 7512 of this title". The words "administrative authority" are substituted for "administrative officer" to avoid conflict with the definitions of "employee" and "officer" in chapter 21 of this title and to



include an individual who is employed by the government of the District of Columbia or who is a member of a uniformed service as such an individual could have been an "administrative officer" under former section 863. The words "the date of" in the phrase "after the date of receipt of notice" are omitted as unnecessary. The words "reasonable rules and" in the phrase "reasonable rules and regulations" are omitted as unnecessary. The word "proper" in the phrase "proper administrative officer" is omitted as unnecessary. The word "designated" in the phrase "designated representative" is omitted as unnecessary.

Standard changes are made to conform with the definitions applicable and the style of this title outlined in preface to the report.

Civil Service Regulations

5 C.F.R. Sec. 752.203

§ 752.203 Right of appeal to the Commission.

An employee is entitled to appeal to the Commission from an adverse action covered by this subpart. The appeal shall be in writing and shall set forth the employee's reasons for contesting the adverse action, with such offer of proof and pertinent documents as he is able to submit.

(a) *Time limit for appeal.* An employee may submit an appeal at any time after receipt of the notice of adverse decision but not later than 15 days after the adverse action has been effected. The Commission may extend the time limit on an appeal to it when the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit.

(b) *Finality of the decision.* The decision of the office of the Commission

**having appellate jurisdiction is final. However, either party to the appeal may petition the Appeals Review Board to re-open and reconsider the decision under § 772.310 of this chapter.**
**[39 FR 32542, Sept. 9, 1974]**



UNITED STATES CIVIL SERVICE COMMISSION
BOARD OF APPEALS AND REVIEW
WASHINGTON, D.C. 20415

# ADVERSE ACTION APPEALS PROCEDURE

Procedure governing the processing of appeals of adverse actions taken under Part 752-B of the Civil Service Regulations (CFR Part 752-B) and submitted to the Board of Appeals and Review under authority of Part 772 of the Civil Service Regulations (5 CFR Part 772).

* * * * *

***WHO MAY APPEAL:***
The department, agency, or individual who is adversely affected by an initial appellate decision of the Commission. An individual may file personally or through his designated representative. When an appeal is filed by an appellant's previously designated representative the letter of appeal should so advise the Board. If the representative is newly designated the letter of appeal should be accompanied by a statement from the appellant indicating the designation.

***HOW TO FILE AN APPEAL:***
The appeal must be in writing, in duplicate, addressed to the United States Civil Service Commission, Board of Appeals and Review, Washington, D.C. 20415. Further representations or arguments, if any, must be presented at the time of appeal. A copy of the letter of appeal should be sent to the Commission's original office of appellate jurisdiction.

***TIME LIMITATION:***
Complete appeals must be filed within *fifteen calendar days* from date of receipt of the initial Commission decision. In cases where the appellant, either the individual or the agency, is represented by more than one representative, submissions from all representatives must be made within the allotted fifteen calendar days. Extensions will not be granted unless justifiable reasons for extension are presented.

When an appeal is filed later than fifteen calendar days after receipt of the initial Commission decision, the appellant will be given an opportunity to explain his failure to file the appeal within the prescribed time.

Where the Board decides that circumstances beyond the appellant's control prevented the appellant from filing a timely appeal, the Board will accept the appeal. If, in the judgment of the Board, the delay in filing an appeal was not caused by circumstances beyond the appellant's control, a decision will be issued declining to entertain the appeal without any further action.

***EXCHANGE OF REPRESENTATIONS:***
Where it is determined that the appeal is timely, one copy of the letter of appeal or brief, where any new or additional representations are made, is forwarded to the other party for rebuttal. Rebuttal, if any, is to be submitted in duplicate within ten days of receipt of the appellant's representations. Copy of the rebuttal is forwarded to the appellant for his information.

***CONSIDERATION:***
The case is adjudicated on the record developed during the processing of the appeal at the Commission's office of initial appellate jurisdiction plus the further representations of the parties on appeal to the Board.

***HEARING:***
There is no right to a hearing before the Board.

GPO 885-156

CSC Form 942
OCTOBER 1968

THE PRESIDENT

## Executive Order 10987

### AGENCY SYSTEMS FOR APPEALS FROM ADVERSE ACTIONS

WHEREAS the public interest requires the maintenance of high standards of employee performance and integrity in the public service, prompt administrative action where such standards are not met, and safeguards to protect employees against arbitrary or unjust adverse actions; and

WHEREAS the prompt reconsideration of protested administrative decisions to take adverse actions against employees will promote the efficiency of the service, assist in maintaining a high level of employee morale, further the objective of improving employee-management relations, and insure timely correction of improper adverse actions;

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution of the United States, by Section 1753 of the Revised Statutes (5 U.S.C. 631), by the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 632, et seq.), and as President of the United States, it is hereby ordered as follows:

SECTION 1. The head of each department and agency, in accord with the provisions of this order and regulations issued thereunder by the Civil Service Commission, and to the extent specified in such regulations, shall establish within the department or agency a system for the reconsideration of administrative decisions to take adverse action against employees. Information on the system shall be brought to the attention of all employees. Within the principles established by this order and subject to the broad guidelines contained in the regulations, each department and agency is authorized to develop such agency appeals procedures as may be appropriate to its own organizational requirements.

SEC. 2. (a) The Civil Service Commission shall, not later than April 1, 1962, issue regulations to put this order into effect and shall make a continuing review of the manner in which this order is being implemented by the departments and agencies.

(b) Nothing in this order shall be deemed to enlarge or restrict the authority of the Civil Service Commission to adjudicate appeals submitted in accordance with Chapter I of Title 5 of the Code of Federal Regulations.

SEC. 3. The Civil Service Commission in issuing regulations and the departments and agencies in developing an appeals system shall be guided by the following principles:

(1) The appeals system shall be a simple, orderly method through which an employee or former employee may seek timely administrative reconsideration of a decision to take adverse action against him.

(2) Employees and representatives of employee organizations shall have an opportunity to express their views as to the formulation and operation of the appeals procedures.

(3) An appeal shall be in writing and indicate clearly the corrective action sought and the reasons therefor.

(4) The system shall provide ordinarily for one level of appeal, except that it may include further administrative review when the delegations of authority or organizational arrangements of the agency so require.

(5) An employee who has not previously had an opportunity for a hearing in connection with the agency decision to take adverse action shall, on his request, be granted one hearing, except when the holding of a hearing is impracticable by reason of unusual location or other extraordinary circumstance.

(6) The employee shall be assured freedom from restraint, interference, coercion, discrimination, or reprisal in presenting his appeal.

(7) The employee shall have the right to be accompanied, represented, and advised by a representative of his own choosing in presenting his appeal.

(8) The employee shall be assured of a reasonable amount of official time to present his appeal.

(9) An appeal shall be resolved expeditiously. To this end, both the employee and the department or agency shall proceed with an appeal without undue delay.

SEC. 4. The head of each department and agency is authorized to include provision for advisory arbitration, where appropriate, in the agency appeals system.

SEC. 5. (a) This order shall not apply to the Central Intelligence Agency, the National Security Agency, the Federal Bureau of Investigation, the Atomic Energy Commission, and the Tennessee Valley Authority.

(b) The Civil Service Commission, on the recommendation of the heads of the agencies concerned, may exclude classes of employees the nature of whose work makes the application of the provisions of this order inappropriate.

SEC. 6. This order shall become effective as to all adverse actions commenced by issuance of a notification of proposed action on or after July 1, 1962.

JOHN F. KENNEDY

THE WHITE HOUSE,
*January 17, 1962.*

[F.R. Doc. 62-699; Filed, Jan. 18, 1962; 10:18 a.m.]

Supreme Court, U. S.
FILED
JUN 10 1977
MICHAEL RODAK, JR., CLERK

No. 76-1466

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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MASAKI HIGA, PETITIONER

*v.*

JOHN C. STETSON, SECRETARY OF THE AIR FORCE, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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WADE H. McCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1976

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No. 76-1466

MASAKI HIGA, PETITIONER

*v.*

JOHN C. STETSON, SECRETARY OF THE AIR FORCE, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

---

Petitioner challenges an administrative determination that he failed to take a timely administrative appeal.

1. In September, 1970, the Department of the Air Force notified petitioner, a career federal employee, that it proposed to terminate his employment on the grounds of disorderly conduct and failure to follow instructions. After considering a written response from petitioner, the Department terminated his employment effective October 16, 1970. In its notice of decision, the Department notified petitioner of his right of appeal either to the Secretary of the Air Force or to the Civil Service Commission, and advised him that any such appeal must be filed within fifteen days from the effective date of his removal (Pet. App. 31).

On October 16, 1970, petitioner met with a union official who according to petitioner agreed to file an administrative appeal to the Civil Service Commission on his behalf. The official failed to file the appeal within the prescribed fifteen-day period. Petitioner filed his own appeal with the regional office of the Commission on August 24, 1971, more than ten months later (Pet. App. 32).

The regional office of the Commission dismissed the appeal as untimely, ruling that petitioner had not been "prevented by circumstances beyond his control from appealing within the time limit" under 5 C.F.R. 752.203 (b)(4) (1970) (Pet. App. 21-22). The Board of Appeals and Review upheld that ruling, stating (Pet. App. 26) that

> the fact that the [petitioner's] representative failed to submit a timely appeal was not a circumstance beyond [petitioner's] control which would warrant the Commission to extend the time limit.

Petitioner then brought this action, claiming that the Commission's refusal to consider his appeal was arbitrary and capricious. On the basis of the administrative record and testimony from petitioner, the district court dismissed the complaint (Pet. App. 28-30). The court of appeals affirmed (Pet. App. 31-33).

2. The Commission's interpretation of its own regulation (5 C.F.R. 752.203(b)(4) (1970)) excusing a failure to file a timely appeal for circumstances beyond an employee's control is subject to considerable deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17; *Northern Indiana Public Service Co.* v. *Izaak Walton League*, 423 U.S. 12. In determining that petitioner had not been "prevented by circumstances beyond his control from appealing within the time limit," the Commission neither abused its



discretion nor acted arbitrarily or capriciously. As the court of appeals observed (Pet. App. 33):

> In this case, [petitioner] merely alleged that he relied on a union official to submit the appeal. He made no showing that he was misled by the union official during the ten-month interim between the effective date of termination and his personal submission of an appeal in August 1971. Neither does the record indicate that [petitioner] was under some disability that rendered him unable to file an appeal personally within the prescribed period. The administrative record contains little or nothing that lends support to [petitioner's] assertion that he was prevented by circumstances beyond his control from filing an appeal to the Commission within the fifteen-day period. On this record, it cannot be said that the Commission abused its discretion or acted arbitrarily and capriciously in denying [petitioner's] administrative appeal.

Contrary to petitioner's claim (Pet. 16), the fifteen-day time limit of 5 C.F.R. 752.203(b) (1970) was not made inapplicable by 5 U.S.C. 7701, which provides for appeals "in writing within a reasonable time after receipt of notice of the adverse decision" in cases involving veteran's preference employees. The fifteen-day limit prescribed in 5 C.F.R. 752.203(b) (1970) constitutes a reasonable agency interpretation of what is "a reasonable time" under the statute, and consequently was properly applied to petitioner. See, *e.g.*, *Udall* v. *Tallman*, *supra*; *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JUNE 1977.

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